80-1397

No. .....

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In the Supreme Court of the United States

October Term, 1980

RONALD CARABBIA,

and,

PASQUALE CISTERNINO,

Petitioners,

vs.

STATE OF OHIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Eighth District Court of Appeals
For Cuyahoga County, Ohio

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QUESTIONS PRESENTED

I. Whether due process and fair trial rights are violated by the admission of eyewitness testimony that was clearly the product of unnecessary and impermissibly suggestive photographic confrontations that were unilaterally conducted *during trial* by the prosecutor and where, in addition to severely restricting defense cross-examination designed to show the totality of the circumstances, the trial court refuses to give a specific instruction on identification evidence?

II. Whether an accused is denied a fair trial and due process of law where the trial court arbitrarily and unreasonably restricts cross-examination of key investigative witnesses and prohibits the accused from eliciting exculpatory evidence material to the issue of guilt or punishment?

III. Whether an accused is denied a fair trial and due process of law where the trial court refuses to order a suppression hearing and compel production of subpoenaed witnesses to determine the admissibility of evidence obtained or derivatively obtained through a facially defective warrant affidavit, especially when the affidavit was:

(1) used to arrest the accused and was relied upon by the trial court in denying bail;

(2) relied upon by the State in returning its indictment against the accused;

(3) relied upon by the trial court as a basis for joining those accused with co-defendants for trial in a capital case; and where

(4) it was represented by the State to be its "theory of prosecution" and relied upon by the accused as a bill of particulars?

IV. Whether the introduction of evidence derived from searches and seizures which were violative of Fourth, Fifth, and Fourteenth Amendment rights, requires reversal of the defendants' conviction?

V. Whether an accused is denied a fair trial with due process of law where the State's prosecutor willfully, and with the express approval of the trial judge:

(1) makes a highly emotional argument punctuated by personal references specifically calculated to stir up racially prejudicial attitudes and otherwise appeal to popular ethnic stereotypes;

(2) informs the jury that he, the State prosecutor, and all of the Federal and local investigators in the case, knew as a fact (based on facts outside the Record) those on trial were not only guilty of the specific charges being tried, but other serious charges as well—including, but not limited to, murders and the bribery of judges and prosecutors;

(3) argued that the various defense attorneys involved in the case were likewise convinced their own clients were guilty; and

(4) commits numerous other acts of professional misconduct in violation of his ethical duties and high responsibilities?

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ARGUMENT I:

Due process and fair trial rights are violated by the admission of eyewitness testimony that was clearly the product of unnecessary and impermissibly suggestive photographic confrontations that were unilaterally conducted *during trial* by the prosecutor and where, in addition to severely restricting defense cross-examination designed to show the totality of the circumstances, the trial court refused to give a specific instruction on identification evidence 6

(A) Where various eyewitnesses were unable to identify an accused from photographs previously shown to them and from still other photographs of the accused that had been seen by them in the newspapers and on television, the presence of defense counsel was required at a photographic display made to these witnesses while the trial was in progress, which display contained only photographs of individuals that had been indicted in the case then on trial 13

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An accused is denied a fair trial and due process of law where a trial court arbitrarily and unreasonably restricts defense cross-examination in areas material to his defense 23

ARGUMENT III:

An accused is denied a fair trial and due process of law where the trial court refuses to order a suppression hearing and compel production of subpoenaed witnesses to determine the admissibility of evidence obtained or derivatively obtained through a facially defective warrant affidavit, especially when the affidavit was:

(1) used to arrest the accused and was relied upon by the trial court in denying bail;

(2) relied upon by the State in returning its indictment against the accused;

(3) relied upon by the trial court as a basis for joining those accused with co-defendants for trial in a capital case;

(4) represented by the State to be its "theory of prosecution" and relied upon by the accused as a bill of particulars 28

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(A) The introduction of evidence improperly seized during a search of Apartment #333, Winchester Hills Apartments, Willoughby Hills, Ohio, on December 5, 1977, and December 13, 1977, requires reversal since there was no probable cause for the issuance of said warrants and the affidavits in support of said warrants contained known false statements or recklessly asserted material statements which were false 31

(B) (1) The introduction of evidence improperly seized during a search of 919 Rondel, Cleveland, Ohio, on February 6, 1978, requires reversal where there was no probable cause for the issuance of said warrant and the affidavits in support of said warrant contained known false statements or recklessly asserted material statements which were false 32

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An accused is denied a fair trial with due process of law where the State's prosecutor willfully, and with the express approval of the trial judge:

(1) makes a highly emotional argument, punctuated by personal references, specifically calculated to stir up racially prejudicial attitudes and otherwise appeal to popular ethnic stereotypes;

(2) informs the jury that he, the State prosecutor, and all of the Federal and local investigators in the case, knew as a fact (based on facts outside the Record) those on trial were not only guilty of the specific charges being tried, but other serious charges as well—including, but not limited to, murders and the bribery of judges and prosecutors;

(3) argues that the various defense attorneys involved in the case were likewise convinced their own clients were guilty; and

(4) commits numerous other acts of professional misconduct in violation of his ethical duties and high responsibilities 35

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STATE OF OHIO,
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PETITION FOR WRIT OF CERTIORARI
To the Eighth District Court of Appeals
For Cuyahoga County, Ohio

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioners, Ronald Carabbia and Pasquale Cisternino, pray that a writ of certiorari issue to review the judgment of the Ohio Court of Appeals, which judgment became final on December 4, 1980; when the Supreme Court of Ohio denied further appellate review.

OPINIONS OF THE COURTS BELOW

The judgment entries by the Supreme Court of Ohio denying further review are set forth at Appendices "A" and "B", pp. A1 and A2 in the Appendix to this Petition.

The Journal Entry of the Ohio Court of Appeals, the judgment to which this petition is directed, is designated Appendix "H", p. A32.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The judgment of the Supreme Court of Ohio was entered on December 4, 1980. The jurisdiction of this Court is invoked under Title 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS WHICH THE CASE INVOLVES

The relevant constitutional and statutory provisions involved herein are set forth as Appendix "M", p. A176.

STATEMENT OF THE CASE[1]

As specifically determined by the Court of Appeals in a statement we adopt not because of its accuracy, but rather, because it does synthesize certain salient facts:

> "On December 5, 1977, . . . Ronald Carabbia and Pasquale Cisternino were named as defendants in a five-count indictment. Named as co-defendants were James Licavoli (aka Jack White), John Calandra, Angelo Lonardo, Alfred Calabrese, Thomas Sinito, Raymond Ferritto and James Fratianno. The indictment alleged that the defendants had conspired to murder and did murder Daniel J. Greene on October 6, 1977, by aggravated arson and for hire in furtherance of an organized crime venture, in violation of R.C. §§2903.01, 2909.02, 2923.01 and 2923.04. Defendants Ferritto and Fratianno entered guilty pleas; Calandra's case was severed for health reasons. The two conspiracy counts were nolled by the State.

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1. Whenever reference is made in this petition to a page in the Record in the trial court, it will be preceded by the prefix "R". References to the Appendix to this petition, filed under separate cover, are noted as "App. ....."

The trial of the case against the remaining six defendants commenced on March 29, 1978, following more than a month of jury selection and motion hearings, on charges of aggravated arson, aggravated murder and engaging in organized crime against all six. Defendant Calabrese's motion for judgment of acquittal was granted following the presentation of the State's case. The jury returned verdicts on May 25, 1978. . . Carabbia and Cisternino were found not guilty of engaging in organized crime and the aggravated murder specification of murder for hire, but guilty of aggravated arson in violation of R.C. §2909.02 and guilty of aggravated murder with the specification of aggravated arson in violation of R.C. §2903.01. Verdicts of not guilty were returned as to all the counts against defendants Licavoli, Lonardo and Sinito.

* * * * *

Daniel J. Greene died as a result of injuries sustained when a bomb placed in a car parked next to his vehicle exploded.

* * * * *

Debbie and Gregory Spoth were driving east on Cedar Road, about to turn north (left) onto Brainard Road. Directly across from them in the opposite westbound lane, they observed a 1973 or 1974 blue Plymouth rolling to the corner, also about to turn north (right) onto Brainard Road. There were two men in the Plymouth, the passenger sitting in the back seat. The driver was in his forties, had salt and pepper colored hair, and was not a large man; Mrs. Spoth recalled that he had a thin face and looked Italian. The man in the back seat was larger, heavier set, dark complexioned, with a receding hairline and, according to Mrs. Spoth, also looked Italian. The Plymouth hesitated in executing the turn onto Brain-

ard so Mrs. Spoth turned left onto Brainard first and the Plymouth followed. Almost immediately after turning, the explosion occurred at Brainard Place to the Spoths' right and Mrs. Spoth momentarily stopped the car. With debris flying toward her car, she then moved ahead. As the blue Plymouth passed her, the occupants faced the Spoths and looked toward the direction of the explosion." (App. A32 to A36.)

ARGUMENTS RELIED ON FOR ALLOWANCE OF WRIT

In this case, at least as to Ronald Carabbia, the most significant issues involve: (1) his identification by Debbie Spoth as the man in the back seat of the car—that is, as the man who detonated the bomb that killed Danny Greene; and, (2) the abusive arguments made by the prosecutor.

Pasquale Cisternino likewise contends he was victimized: (1) by the prosecutor's summation; (2) by the rulings denying his motions to suppress illegally seized evidence; and (3) he contends that, to the extent he could only be convicted *under the charge given the jury* if Carabbia was convicted first, he necessarily would be a beneficiary if the Court credits Carabbia's identification arguments.

Here the Opinion below, in dealing with the identification issues, is flawed almost beyond belief. This thought is punctuated, in our judgment, by the court's flagrant *unwillingness* to recognize that the overriding issue in this appeal was whether those on trial had a fair trial as distinguished from whether the trial judge and the prosecutor could be excused for the wrongs committed by them—wrongs that virtually insured somebody would be convicted.

Under Section VII of its Opinion, where we are told the "record does not support the implication that [prosecu-

tor] Marino made any suggestion that Carabbia was the man in the back seat" (App. A79). Obviously, the court must truly be oblivious to the fact that defense counsel were prevented by the prosecutor and the judge, who endorsed Marino's objections, from developing various lines of inquiry designed to establish a basis for the inference that this is precisely what occurred. Additionally, the court specifically credited defense counsel with having said, at the time, that such questions were "critical as the court would not allow assistant prosecutor Marino to take the stand" (A78).

Simply put then, the Opinion holds that while there were only two people present (a choice willfully made by *the* sort of trial prosecutor who, in his all-out quest for a verdict, would brazenly make the type of unethical charges made by him against all defense counsel in this case), it was proper to deny the defense *any* realistic opportunity to show the identification of a particular defendant corruptly influenced on the one hand, and to punish him for having failed to do so on the other.

As to the Opinion's treatment of the manifestly prejudicial final argument made by the prosecutor, aside from the sheer illogic of its ultimate rationale, petitioners' arguments expose more than a mere perceptible reluctance by the court to sanction a prosecutor for willfully abusing his role as a public servant, especially when it is done in quest of personal glory—the case here. *Cf., United States v. Gleason,* 616 F.2d 2, at 27, fn. 19 (1980), where the court expressed the idea that "scurrilous statements, which indicate a reckless disregard by counsel for the facts in the record exceed the bounds of responsible advocacy in our adversarial system and merit consideration by the Bar Association Grievance Committee for appropriate action."

What, of course, makes the issue here as to the prosecutor's opprobrious, egregious and pervasive mis-

conduct so important is not just limited to the fact that the State courts have simply refused to recognize what was done by the prosecutor resulted in unadulterated and prejudicial unfairness. These courts have actually succumbed to the specious prosecutorial arguments made in defense of such willful misconduct as was occassioned by the summations made emphasizes the extent to which these petitioners have been victimized. In this regard too, it is noteworthy that the prosecutor's arguments below were punctuated by absolutely outlandish assertion that, in any event, "the overall record will bear out the State's contention that both defendants received a fair trial, and that . . . [his] argument was within the bounds of propriety." The fact that this prosecutor would still maintain, as he did, that he really did not do anything wrong shows beyond any doubt that counsel opposite was then, and is now, fully convinced he could do no wrong in this case in the eyes of any Ohio Court.

I. DUE PROCESS AND FAIR TRIAL RIGHTS ARE VIOLATED BY THE ADMISSION OF EYEWITNESS TESTIMONY THAT WAS CLEARLY THE PRODUCT OF UNNECESSARY AND IMPERMISSIBLY SUGGESTIVE PHOTOGRAPHIC CONFRONTATIONS THAT WERE UNILATERALLY CONDUCTED DURING TRIAL BY THE PROSECUTOR AND WHERE, IN ADDITION TO SEVERELY RESTRICTING DEFENSE CROSS-EXAMINATION DESIGNED TO SHOW THE TOTALITY OF THE CIRCUMSTANCES, THE TRIAL COURT REFUSED TO GIVE A SPECIFIC INSTRUCTION ON IDENTIFICATION EVIDENCE.

As to the specific contention here being made, the Court of Appeals found that the State's procedure in effecting the "eyewitness identification" of Ronald Carab-

bia as the "back seat occupant" with Ferritto at the time of the Greene murder, was "neither extraordinary nor suggestive . . . and that the Record did not reveal that he [prosecutor Marino] encouraged Mrs. Spoth to select the photo of Carabbia over any other" (App. A75).

(1)

Here the Record shows that prior to February 16, 1978, Debbie and Gregory Spoth had repeatedly rejected photographs of Ronald Carabbia as even resembling the person in whose place Carabbia was convicted (R 3111, 3158, 3186, 3191, 3213-14, 3508-16).

Prosecutor Marino, in meeting *alone* with each of the Spoths, only produced mug shots of the various defendants indicted in the Greene bombing. And, he informed the witnesses that the photos were those of suspects involved in the Greene murder (R 3344, 3707). In addition, these witnesses were already aware of the identity of those being prosecuted via various news media reports (R 3504-08). The photos of Licavoli, Lonardo, Fratianno, and Calandra were far too old as they were men in their 70's (R 3709, 3711). Ferritto had previously been identified as the driver (R 3710); whereas, Cisternino had been previously rejected as looking "too young" (R 3110). The same was true of Calabrese and Sinito (R 3709). Thus, the Spoths had only one possible choice from amongst the defendants—that is, Ronald Carabbia (R 3711-12). Predictably, both picked Carabbia as "most resembling" the man in the back seat but indicated they would have to see him in person "to be sure" (R 3276, 3383). It was at this point that various law enforcement officers informed the Spoths that they believed the tentative identifications were correct[2] (R 3615). (If nothing else, the officers' belief

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2. In *United States v. Moskowitz*, 581 F.2d 14, 20 (2d Cir. 1978), the Second Circuit, in rather compelling language, concluded that reinforcing a witness' identification by confirmatory remarks reduces the trustworthiness of any in-court identification.

in this regard verifies our charge that these witnesses were manipulated.)

Defense counsel seasonably motioned the court to exclude all testimony as to these identifications. It was contended this photo display was improper, overly suggestive and was conducted in violation of the right to the presence of counsel (R 3395-3399). Carabbia's defense counsel also requested disclosure of who arranged the February 16, 1978 meeting (R 3342-43); whether Patrolman Volpe or anyone had made suggestions to the witnesses (R 3442); and an examination of prosecutor Marino regarding his influence on the witnesses during presentation of photos on February 16, 1978 (R 3393). The trial court denied each request for disclosure (R 3343, 3492). And, the court would not permit examination of the prosecutor (R 3400).

During *voir dire,* Debbie Spoth testified that she was "almost positive" Carabbia was the man in the back seat of the Plymouth (R 3276). Also during *voir dire*, Gregory Spoth, when asked by the prosecutor if he could identify anyone in the courtroom as matching his description of the back seat occupant, responded, "Yes. One individual resembles him very strongly" (R 3378-79). Gregory Spoth then identified Ralph Sperli, attorney for Cisternino, as the back seat occupant with Ferritto (R 3379).

Significant here, Gregory Spoth's direct testimony before the jury was different from that given during *voir dire.* Spoth, this time, testified to seeing individuals in the courtroom that looked similar to the back seat occupant (R 3565), as opposed to his conclusive prior identification of defense counsel Ralph Sperli as the "one" individual that most resembled the passenger in the car (R 3379).

It was here that the court determined Mr. Spoth's identification evidence on this point to be too speculative, since he could not select one individual, and foreclosed further inquiry (R 3573-74).

(2)

The analysis set forth below demonstrates the identification procedure utilized by the State was grossly prejudicial to Carabbia's fundamental rights to counsel, confrontation and due process of law. This prejudicial denial of rights was equally offensive to Cisternino under the trial court's charge to the jury.[3]

The "totality of the circumstances test," as ultimately construed in *Manson v. Braithwaite,* 432 U.S. 98 (1971), undeniably furnishes the relevant criteria for determining the admissibility of both out-of-court and in-court identifications. An application of this analysis to the "facts" in this Record shows the following:

(*a*) *Opportunity to Observe*

Synthesized, Debbie Spoth's testimony shows that she was driving with her husband as a passenger, when her car made a left turn from Cedar Road in front of the car driven by Ferritto which made a right turn onto the ramp. She saw him "full face and a side view." As specifically put by her, it was "as I turned I saw him" (R 3265). What she saw, even as put by the witness, was "from . . . the shoulders up" (R 3266). This witness added that her view was, at best, only for "a couple of seconds" (R 3315). And, of course, all this took place at a time when there

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3. Specifically, the court instructed the jury as follows:

"If you find the defendant Carabbia not guilty, your verdict, under the evidence of this case, must also be not guilty as to the defendants Cisternino, Lonardo, Sinito and Licavoli." (App. A135)

was no reason to try to remember the occupants of this car (R 3311-3312). When the explosion occurred, the Ferritto car was behind her car (R 3267-69).

Distilled, Debbie Spoth's evidence shows that, at most, she saw two men in a car for a maximum of a few seconds —*once,* when she turned left in front of them and *again* when their car passed her car that had stopped after the explosion (R 3316). Here, her critical testimony shows:

> Q. It would be pretty fair to say that when you turned to your left after being ordered by your husband to move the car, and after the impact of the explosion, you just seemed to recall that this was the same blue car you saw back there at the intersection. Is that correct?
>
> A. Yes.
>
> Q. Sure. In other words, after everything that had happened to you and everything that was going on at that time, *you really didn't have an adequate opportunity to take special notice of anything when you quickly turned to your left and saw the blue car going around you, except for the fact that there were two men in the car?*
>
> A. *Right.*
>
> Q. *Is that a fair and complete and accurate statement?*
>
> A. *Right.* (R 3323 [emphasis added].)

(*b*) *Lapse of Time*

Debbie Spoth's "almost positive" identification of Ronald Carabbia took place approximately 157 days after the critical event. During this period, she passed over the picture of Ronald Carabbia many times. Indeed, during her testimony at one point, she stated none of the photographs shown her prior to February 16 even "resembled

the man I saw in the back seat" (R 3491). And, even on February 16, 1978, when she was given only pictures of those indicted at that time for this crime, the most she could say was that she would have to see Ronald Carabbia, the person they obviously wanted identified, before she could make any identification (R 3576). This, she tells us, was in response to a question by prosecutor Marino as to whether she "recognized" any of the pictures then being shown her (R 3504).

Significant here, in *Manson*, 432 U.S., at 116, this Court emphatically noted: "We do not have here the passage of weeks or months between the crime and the viewing of the photograph." This point becomes even more important in the light of *Neil v. Biggers*, 409 U.S. 188 (1972), where, as here, months intervened, a circumstance that caused this Court to emphasize that such a delay "would be a serious negative factor in most cases" (*Id.*, at 201).

(c) *Degree of Attention*

As to this facet of the test for reliability, the points made above (both as to duration of the asserted view and the lack of any reason to intensify her recollection) apply full strength here.

(d) *Accuracy of Prior Description*

Here we emphasize the descriptions furnished by the Spoths to the police (R 3523-3524), contained the specific indication that the other man in the car with Ferritto (whose age was estimated as being 40 to 45) was "older, glasses or sunglasses, not heavy, receding hair, white male, dark hair." Even more significant, when specifically asked to respond to the precise and unambiguous question: "Can you identify the occupants now?", their unequivocal, indeed categorical, response was: "Driver, yes."

(e) *Level of Certainty*

Any contention that Debbie Spoth indicated a sufficient level of certainty even at the trial itself must surely reckon with the ultimate fact that her original in-court identification (made after having seen many pictures of Carabbia) was only "almost positive" (R 3276). Here, it should be noted that in the midst of the prosecutor's "testimony" given under the guise of final argument (App. A123), he confessed that Debbie Spoth, after saying the identification of Cisternino was "not right," simply stated that "this man [Carabbia, whose picture was in the array] is more like him, but I've got to see him in person."

Under the *Manson-Biggers* test seemingly against the relevant factors, which doubtless includes some consideration as to "the *necessity* of the photographic identification procedure," *Mata v. Sumner,* 611 F.2d 754, at 757 (9th Cir. 1979), *vacated and remanded,* ..... U.S. ..... (1981), is to be weighted the corrupting effect of the suggestive identification itself. See *Manson,* 432 U.S., at 114.

(3)

Here, of course, not only do we have the usual post-indictment stage, where there can be no reason for a photo display except to influence the witness before testifying, *Davis v. United States,* 425 F.2d 673 (9th Cir. 1970); *United States v. Washabaugh,* 442 F.2d 1127 (9th Cir. 1971), and *People v. Gonzales,* 261 N.E.2d 605 (N.Y. 1970); we have further situation where the trial was actually in progress when the photos were displayed. Simply put, we are concerned with the willful use of impermissibly suggestive photographic identification procedure (*by the trial prosecutor in the midst of trial*) for the sole purpose of having witnesses, who had previously expressed an inability to do so, make positive identifications of a particular defendant.

Other relevant circumstances show (if Debbie Spoth's trial testimony is as believable as the State contends it was) that the prosecutor was in serious violation of a significant ethical duty that he owed to the defense. This duty required him to affirmatively disclose to the defense that this witness, who he must now say without reservation had a good and sufficient view, *was positive* that Cisternino *had not accurately been identified* by the State's chief witness. See *United States v. Agurs,* 427 U.S. 97, 112 (1976), and *Alabama v. Cannon,* 558 F.2d 1211 (5th Cir. 1977).

Hopefully the Court will agree something has to be grossly wrong if a trial prosecutor can insulate from judicial scrutiny his resort to an unnecessary and impermissibly suggestive photographic identification procedure simply by making certain he is alone with each witness when the photos are shown.

A. Where Various Eyewitnesses Were Unable to Identify an Accused From Photographs Previously Shown to Them and From Still Other Photographs of the Accused That Had Been Seen by Them in the Newspapers and on Television, the Presence of Defense Counsel Was Required at a Photographic Display Made to These Witnesses While the Trial Was in Progress.

In the Opinion below, the court saw *United States v. Ash,* 413 U.S. 300 (1973), as providing a complete response to the argument that, in the context of this case, due process required the presence of counsel when the photographs were shown the witnesses once the trial as in progress (App. A74). While *Ash* certainly has to be considered, still there are varying considerations here that have to be accommodated which were ignored by the court below. *First,* the critical confrontation in *Ash* occurred *before*

trial; whereas here, it took place *after* the trial had actually commenced. Also, the display here contained pictures that were highly suggestive and were willfully presented to the eyewitnesses in a suggestive manner. For, indeed, the sole purpose for encouraging the witnesses to identify a particular picture from those of the defendants in this case (R 3344-45, 3507), when previously they were unable to do so, could only have been to manufacture identification testimony for use at trial.

Here it is significant that in *Ash,* this Court did indicate the presence of counsel for the defense is required when his presence would be necessary "to produce equality in a trial-like adversary proceeding" present in any situation where his legal rights may be prejudiced in the absence of a professionally knowledgeable individual to present or preserve them. Additionally, as was rather cogently recognized by Justice Stewart concurring in *Ash,* this right of counsel also arises at any identification confrontation where the circumstances of the confrontation make counsel "essential 'to protect the fairness of the trial itself.' " (413 U.S., at 322).

Still another point made by this Court recognizes that the due process clause "does speak to the balance of forces between the accused and the accuser." *Wardius v. Oregon,* 412 U.S. 470, at 474 (1973). *Cf., United States v. Ash,* 413 U.S., at 309. Thus, our position here is that the determination of whether counsel was required to be present when these photos were shown to Debbie Spoth cannot turn solely on the rule announced in *Ash.* Rather, the essential question is whether the risk of prejudice in the particular procedure involved here was such that "the absence of counsel might [have] derogate[d] from his right to a fair trial." *Gilbert v. California,* 388 U.S. 263, at 267 (1967).

B. Due Process Is Violated When the Prosecutor, in Quest of an Identification of a Particular Defendant, Unnecessarily Shows to Various Eyewitnesses Only Photographs of Those Indicted for the Particular Offense, Which Photographs Failed to Provide Any Realistic Alternative to the Identification of the Particular Defendant.

The photographic identification displays involved in this case, apart from the positions taken above, also violated due process standards. Our starting point is the undeniable fact that any time photographs are shown to a witness, there is always the danger of an incorrect identification. This danger is necessarily increased as to a particular individual if his photograph is repeated in subsequent displays, or is otherwise emphasized or portrayed to the witness as the person whose identity is being sought.

In essence, our contentions are that the post-indictment, *ex parte*, photographic identification by Debbie Spoth was based on a grossly impermissibly suggestive photographic display. This is especially so here since the facts and circumstances showing this to be the case were developed in spite of the rather severe handicaps that were, only to a degree, surmounted. Thus, it is significant here that these unjustified handicaps, imposed on counsel by the trial court, were patently calculated to prevent the defense from demonstrating to the jury that Debbie Spoth's identification of Carabbia resulted from a procedure that was so inherently suggestive as to infect, and otherwise corrupt, her ability to make a reliable in-court identification.

Because the only photos shown the Spoths at this point were of the various defendants charged in this case, such become a very relevant factor. Again, of these pictures,

those of Licavoli, Lonardo, Calandra and Cisternino could not possibly have provided any challenge to the witness—Licavoli, Lonardo and Calandra all appeared to look their ages, well over 60. And, by her own testimony, Debbie Spoth was familiar with the picture of Cisternino whereas Sinito and Calabrese were readily excludable on the basis of age. They were too young, both in fact and appearance. Thus, in dealing with the test for determining the reliability of the identification evidence in this case, we are at once overwhelmed by the lack of *any* exigent circumstances to justify, to any extent, the abusive way in which the prosecutor handled the photographic identification procedures that were resorted to in this case.

It should also be noted the Court of Appeals concluded "[t]he fact that assistant prosecutor Carmen Marino, rather than a police officer, conducted the photo display is neither extraordinary nor suggestive . . . and that the Record does not reveal that he encouraged Mrs. Spoth to select the photo of Carabbia over any others" (App. A75). For our part, the court's position evidences a gross failure to even concede it to be possible that these court-pampered prosecutors are capable of chicanery. Hopefully, this Court will see the relationship between our inability to call this prosecutor as a witness (and develop among other things, whether he willfully made himself the only possible witness to the facts surrounding Debbie Spoth's identification of Carabbia's photograph) and the validation of her identification testimony. Since only the Spoths were allowed to testify as to what was said and done by Marino, obviously the issue is not one that can be resolved on general principles. *Cf., Swicegood v. Alabama*, 577 F.2d 1322 (5th Cir. 1978).

C. Reliability Being the Critical Factor As to Any Identification Evidence Which Turns on "the Totality of the Circumstances Surrounding It," Any and All Facts Relevant to This Inquiry Are Properly for the Consideration of the Jury.

In dealing with the episode whereby the trial judge refused to allow the defense to show Gregory Spoth had actually identified one of defense counsel as the person in the room who most resembled the man in the back seat, the Court of Appeals reached a conclusion that makes absolutely no sense at all. Here we refer directly to the court's remarkable statement to the effect that the trial judge was really protecting the defendants from the incompetency of their attorneys because the elicitation of the evidence counsel sought to develop in this connection "could have operated to . . . prejudice" their clients "by allowing the jury to theorize who . . . most resembled the attorney who had been identified" (App. A76-A77).

The most absolute and irradicable flaw in the court's ratiocination on this point is not limited to the fact that any effort by the jury to determine who most resembled Ralph Sperli would have been irrelevant to the fact that the witness had actually eliminated Ronald Carabbia before he identified Sperli as most resembling the man in the back seat. This being so, for the appeals court to say the trial judge (whose overall performance in this case shows he was hardly trying to protect those on trial from the flagrant excesses indulged in by the prosecutor) was really protecting the defendants is ridiculous (App. A77). This is so because, apart from the fact that counsels' experience in defending criminal cases was at least equal to that of the judge, it makes even less sense to say that this judge (or any judge for that matter) necessarily knew more

about what was good or bad for these defendants than did their own *privately retained* counsel.

Another fact makes the inability of the defense to show Gregory Spoth picked attorney Sperli an error of significant proportion. Gregory Spoth was a professional art dealer who, by his own admission, had been trained to pay considerable attention to details—a necessary and special skill in the identification of art works. Here the Record shows Gregory Spoth actually conceded that he had been "trained to make determinations of structures of features; *i.e.*, eyes, nose, bone definition, things of this nature" (R 3585). Indeed, a skill somewhat comparable to Spoth's had been regarded as a significant identification factor. See *State v. Callaghan,* 526 S.W.2d 59 (Mo. App. 1975).

In finding against petitioners on the specific contentions here being made, the appellate court adopted some rather arbitrary positions (App. A69 *et seq.*). More importantly, the Opinion rather conspicuously ignored various significant tenets that had been called to its attention. Among these was the principle discussed in *Flowers v. Ohio,* 564 F.2d 748 (6th Cir. 1977). There it was held a defendant has a right to show that unduly suggestive identification procedures had, in fact, tainted the in-court identification evidence. And, that the limitation on the defense's cross-examination designed to accomplish this was a constitutional error. Indeed, in *Flowers* the Sixth Circuit specifically concluded that the jury was entitled to have the benefit of any evidence bearing on "the credibility of the in-court identifications" (564 F.2d, at 750). Similarly, even the Ohio Supreme Court had, in *State v. Hannah,* 54 Ohio St. 2d 84 (1978), reversed a conviction affirmed by the Court of Appeals involved in this case on the very same argument. Here it was concluded that "where [as here] a conviction must turn substantially upon

the identification of the defendant as the guilty actor . . ., *any* unreasonable limitation upon defendant's right to cross-examination . . . is prejudicial error" (syllabus).

Again, we are here concerned with petitioners' inability to show the existence of certain relevant factors during our cross-examination, not only of the Spoths, but of Detective Vanyo (who supplied the original pictures for the displays), Officer Volpe (showed the original pictures to the witnesses) and Lieutenant Wegas (who was privy to all these happenings).

As to Officer Volpe, the father of Debbie Spoth, the trial court sustained objections to inquiries as to: whether he (Volpe) knew that "an identification can be influenced by police officers" (R 3141); whether, as a 25-year police officer, he would in quest of an identification show a witness a picture that obviously did not conform with the discriptions submitted by such witness of the suspect (R 3142); whether he regarded it as proper to separate eyewitnesses before asking for an identification (R 3142); whether he made any effort to talk to the witnesses individually when they first gave him their descriptions (R 3144); whether his lack of knowledge at the time as to whether these eyewitnesses would testify "lessen[ed] in any degree his responsibility to preserve their testimony in a fundamental way" (R 3146); whether he was aware that "first descriptions are usually the best descriptions" (R. 3147); whether he tried to exploit (or tailor) their memory when he would talk with them (R 3148).

As to Lieutenant Vanyo, who admitted being most familiar with lineup techniques, the court barred an entire line of interrogation stemming from the question as to whether any lineup was ever conducted for these witnesses (R 3192). Also, Vanyo was prevented by the court from telling the defense whether his selection of

Ritson's picture without a beard "was to get him excluded in the identification of the witness" (R 3192-93).

In the Spoths' *voir dire* examination, the Record shows the court disallowed questions seeking to have Debbie Spoth (1) estimate Ronald Carabbia's weight (R 3350); and (2) take a closer look at him (R 3351).

The Record also shows that, at a most crucial point in Debbie Spoth's cross-examination, the court sustained objections to questions that asked her if, during her conversations with her father or any other member of the State's team, "there were some suggestions made to her as to the information they had as to who was in the back seat of the car" (R 3492). As to this particular question, its criticality cannot be disputed since the court made it clear that the defense would be refused the right to put the prosecutor, Carmen Marino, who had willfully and inextricably involved himself with, and was a material witness to what had occurred, on the witness stand (R 3400) —a ruling that necessarily influenced all cross-examination of these witnesses in the presence of the jury.

All this was then aggravated by the fact that during the prosecutor's in trial examination Gregory Spoth was *again* asked to look about the room to see if he could "identify anyone that was in the back seat of the Plymouth on October 6, 1977" (R 3656). Thus, it was that, despite having been shown a photograph of Carabbia by the State during their vigorous efforts to rehabilitate him following his identification of Sperli (R 3383), Gregory Spoth could only state there were several people that "look similar to the man in the back seat" (R 3567). Stated another way, Gregory Spoth assured the court he "could pick out people [then in the courtroom] that resemble[d] the person in the back seat" (R 3569).

Still later, and after the court had repeatedly indicated the defense would not be allowed to show through their cross-examination of Gregory Spoth his identification of one of the defense lawyers, Ralph Sperli, as being in the car with Ferritto (R 3568-3582), the court nonetheless acquiesced in the prosecutor asking Spoth still another question calling for an in-court identification. This time Gregory Spoth testified there were in the courtroom "individuals that look similar to that individual" (R 3583). However, even after this further effort by the State to manipulate Gregory Spoth into identifying Ronald Carabbia, the court again refused to allow cross-examination of Gregory Spoth as to whether he had "ever identified anybody . . . as being the person who . . . [he] believed resembled the person who was in the back seat on October the 6th" (R 3585).

What makes the court's restriction of defense counsel's cross-examination here all the more gross is that counsel for the State agreed with the defense that the court "should not exclude those witnesses from making the same identification before the jury as they did before the court without the jury here" (R 3399). Indeed, as put by counsel for the State, he did not "feel that there is any reason to exclude their testimony, including the fact that Mr. Spoth identified Sperli as resembling, as most resembling, the individual he saw in the car" (R 3399-3400).

In our view, as long as "cross-examination is the principal means by which the believability of . . . testimony is tested," its use simply cannot be stifled to the extent it was below. See *Davis v. Alaska,* 415 U.S. 308, at 316 (1974). It is clear then that the Opinion being challenged by this Petition, affirming the trial court's patent refusal to allow the defense to show this misidentification by an eyewitness, is contrary to law and makes constitutionally invalid these convictions. This conclusion must surely be

valid if it is still the law that as an essential requirement for a fair trial the defense must be allowed to engage in a searching and wide-ranging cross-examination of the witnesses who provide evidence against him. See *Smith v. Illinois,* 390 U.S. 129 (1968), and *Alford v. United States,* 282 U.S. 687 (1930).

D. Neither the Summation of Counsel, nor His Cross-Examination of the Identification Witnesses, nor Even the Court's Instruction on the Credibility of the Various Witnesses May Be Regarded As a Sufficient Substitute for a Proper Instruction on Mistaken Identity.

Prior to argument, counsel for Carabbia submitted to the court in writing a specific instruction on eyewitness identification testimony. This instruction was patterned after the *Telfaire* decision and carries that name. The trial court denied the requested instruction as unacceptable (R 9771). After the court's written instruction was read to the jury, counsel *once more* called to the court's attention his desire for a *"Telfaire"*-type instruction and *again* complained that the court's given instruction was not merely insufficient insofar as eyewitness testimony was concerned, but was nonexistent (R 9771; 9385-9436). The court predictably ignored our objections to his charge (R 9840-41).

It is petitioners' position that the denial of a basic cautionary instruction on eyewitness identification testimony, such as was required in *United States v. Telfaire,* 469 F.2d 552 (D.C. Cir. 1972), constituted a prejudicial abuse of discretion under the unique facts at bar. *United States v. Greene,* 591 F.2d 471 (8th Cir. 1979) and *United States v. O'Neal,* 496 F.2d 368 (6th Cir. 1974). Also see *United States v. Hodges,* 515 F.2d 650 (7th Cir. 1975).

In *United States v. Greene, supra,* the court noted the special problems of reliability inherent to eyewitness identification testimony. To this end, the court concluded "it is essential that a jury be aware of the conditions under which the observation was made, the physical ability of the witnesses to observe the defendant, any possible problems which could distort the witness' observation powers and judgment." 491 F.2d, at 475.

Here, as was the situation in *United States v. Greene, supra,* Ronald Carabbia's mistaken identity theory was supported by strong alibi testimony. Thus, the *Greene* court's findings that this circumstance alone was sufficient "to warrant the additional protection against misidentification that the *Telfaire* instruction provides," 591 F.2d, at 476, is equally applicable to the facts at bar.

II. AN ACCUSED IS DENIED A FAIR TRIAL AND DUE PROCESS OF LAW WHERE A TRIAL COURT ARBITRARILY AND UNREASONABLY RESTRICTS DEFENSE CROSS-EXAMINATION IN AREAS MATERIAL TO HIS DEFENSE.

As to the argument regarding the trial court's arbitrary restrictions on and denial of fundamental rights of confrontation and compulsory process, the Court of Appeals determined that the various FBI agents responsible for the investigation and theory of prosecution could present direct evidence for the State against the defendants but could still refuse to answer *any* question they deemed *inappropriate* on cross-examination. This was so even if the responses being sought might discredit testimony presented during their direct examination or would tend to disclose exculpatory evidence material to the defense.

The defense, of course, had informed the trial court it was essential to their defense that they develop the

victim Greene's intimate relationship with the FBI for whom we contended he worked for his own convenience (R 5587-90). It was established by exhibits, attached to pretrial motions, that the Cleveland Intelligence unit characterized the victim Greene as the "king" of organized crime in Cleveland and a prime suspect in "75 to 80%" of the area's recent bombings; and, that it was publicly suspected the victim Greene managed to escape prosecution for these crimes because of his work for the FBI as a "valuable" informant. Significantly, we now know that another FBI informant, Jimmy "The Weasel" Fratianno, who arranged for Ferritto (who was a business partner with another FBI informant, Frank "Bolo" Dovishaw) to kill still another FBI informant—Danny Greene. (It should be noted that Fratianno was involved in the murder of still another FBI informant—Frank "The Bomp" Bompensario in San Diego, California.) The defense argued that disclosure of this evidence was material and relevant because it exhibited a course of "outrageous" bad faith conduct on the part of those agents in charge of the varying aspects of this investigation and it was evidence of government "overinvolvement" in the crimes alleged.

The defense further argued that Danny Greene's true relationship with the FBI was of particular importance because it would show that other individuals never associated with the defendants Ferritto, Fratianno or other FBI informants, and reportedly involved in illegalities with the victim and closely tied to his murder, would have a more likely motive to kill Greene. Significantly, recent disclosures had revealed that individuals never associated with petitioners (*i.e.*, Liberatore, Thomas Lanci, Kenneth Ciarcia, Ronald Guiles and Louis Aratari) had obtained a confidenital list of FBI informants from a clerk, Geraldine Rabinowitz, employed at the Cleveland FBI office. It was contended that disclosure of the victim's informant status

and his relationship to the stolen documents was material to the defense because it tended to establish an alternate theory of the crime that was exculpatory to the defendants then on trial (R 5275-76; 5287-88). In fact, a story appearing in the *New York Times* revealed that Greene's informant status with the FBI and the leak of confidential documents by the FBI's Cleveland office may very well have been the reason for Greene's murder (R 1045).

During the course of the trial, defense counsel even attempted to discredit the State's case and elicit evidence favorable to their defense of alternate theories of the crime. Testimony presented by the State's chief witness was that he made numerous trips to Cleveland in furtherance of the murder conspiracy and stayed overnight at hotels alone (R 3787-88). Hotel records indicated that Ferritto had generally had a room with another individual (R 4561, 4559, 4575, 4586). Ferritto also testified that he was involved in a gambling operation with one Frank "Bolo" Dovishaw in Erie but that Dovishaw was not involved in the Greene murder (R 3957). Yet, and again contrary to Ferritto's supposedly reliable testimony, other evidence established that Dovishaw obtained the title and plates to the Plymouth used in the murder (R 2101, 2111); that Dovishaw had repairs made on the Plymouth just prior to the murder (R 2117); that Dovishaw had the Plymouth "wiped down" for fingerprints after the murder and painted a different color (R 4655-63, 4684, 4664); that Dovishaw abandoned the Plymouth and concealed other evidence relating to the Greene murder, including the license plates and keys and what looked like a remote control aerial (R 4667, 4688-90, 4729). It was also learned that Dovishaw had not been seen in Erie since about one month after the murder (R 4764-65).

FBI Special Agent Lenehan testified regarding evidence discovered at Dovishaw's home in Erie and relating to the Greene murder (R 4848). Defense counsel's efforts to question Lenehan regarding Dovishaw's involvement in the murder and his relationship to the FBI (R 4850, 4860) were met by the agent's refusal to answer on the grounds that the information was beyond the scope of his "authorization" (R 4855-56, 4863). The agent's refusal to answer these questions was ratified by the trial court on the basis of the naked representation of the Federal prosecutor that the information was privileged (R 4860-66). Petitioners were similarly restricted in their cross-examination of other agents regarding Dovishaw's involvement in the crime (R 5557-67, 5572-78).

In addition, the defense's attempts to elicit evidence from various FBI agents regarding the motives of other individuals known to the FBI to have sufficient motives to kill Greene if his informer status were disclosed was also prohibited (R 5260, 5266, 5273-76, 5287-88). However, at one point, the court made it clear Greene's association with the FBI was irrelevant and could not be elicited at all (R 4098, 5277).

Geraldine Rabinowitz, the clerk who stole and sold the confidential FBI documents, testified that Liberatore, Lanci and Ciarcia asked her for the identity of FBI informants (R 6953). Liberatore, Lanci and Ciarcia were said to have wanted this information for their own use (R 7027). Evidence previously presented had revealed that Greene had associated with Liberatore and Lanci and may have been set up by them (R 6276-78, 6353-54, 6280). Again, the court found that the contents of the documents were irrelevant (R 6805) and refused defense requests for the opportunity to inspect these documents (R 6794).

The defense's attempts to discredit the State's case by eliciting favorable evidence of an alternate theory of the crime were further frustrated when the trial court prohibited the witness Debbie Spoth from disclosing whether she knew Liberatore and Lanci and the nature of her relationship (R 2090-96). And, the defense was restricted from learning which FBI agent had participated in a search of Fulton Fish Market when a cache of weapons, fuses and explosives was seized relative to a search involving Liberatore, Lanci, Ciarcia, Arataria and Guiles (R 7282).

The Opinion below cites *United States, ex rel. Touhy v. Ragen,* 340 U.S. 462, 467-69 (1951), and *United States v. Allen,* 554 F.2d 398 (10th Cir. 1977), to support the trial court's position that a law enforcement agency's privilege (28 C.F.R. §§16.25 and 16.26) could justifiably result in the refusal of law enforcement agents to produce evidence *in camera* or answer questions on cross-examination which an accused represents to be material to his defense. For our part, it is clear that, under the facts at bar, the privilege asserted by the prosecution could not constitutionally override petitioners' fundamental rights to confront their accusers and produce exculpatory evidence in their defense.

III. AN ACCUSED IS DENIED A FAIR TRIAL AND DUE PROCESS OF LAW WHERE THE TRIAL COURT REFUSES TO ORDER A SUPPRESSION HEARING AND COMPEL PRODUCTION OF SUBPOENAED WITNESSES TO DETERMINE THE ADMISSIBILITY OF EVIDENCE OBTAINED, OR DERIVATIVELY OBTAINED THROUGH A FACIALLY DEFECTIVE WARRANT AFFIDAVIT, ESPECIALLY WHEN THE AFFIDAVIT WAS:

(1) Used to Arrest the Accused and Was Relied Upon by the Trial Court in Denying Bail,

(2) Relied Upon by the State in Returning Its Indictment Against the Accused,

(3) Relied Upon by the Trial Court As a Basis for Joining Those Accused With Co-Defendants for Trial in a Capital Case,

(4) Represented by the State to Be Its "Theory of Prosecution" and Relied Upon by the Accused As a Bill of Particulars.

In our view, the court's arbitrary conclusion that standing was lacking (App. A51-A52) had the effect of depriving Cisternino of the right to establish that his privacy interests were violated.

Here, of course, the State had to establish, on the basis of the December 5, 1977, affidavit of Agent Kahoe, "probable cause" to arrest, search, indict and incarcerate these petitioners without bail (R 282-85). This affidavit (App. A141) was said by the trial court to provide the State's theory of prosecution and was relied on by the trial court in joining, over objection, the various defendants for trial (R 282-85, 292, 309-16).

Contrary to the Opinion below that the affidavit contained only *"one"* falsehood (App. A52-A53), a substantial showing was made as to the presence of *many* falsehoods. To be sure, pretrial disclosures exposed Ferritto's *lies* about Cisternino's purported involvement in the crimes alleged (R 969-70, 988-90, 994); that he *lied* regarding defendant Fratianno's involvement (R 938); that he *lied* about the involvement of other unindicted individuals (R 973-75); and, that he concealed the identity of other individuals who were present at the murder scene and principal participants in the crimes alleged (R 980-93).

Other disclosures also showed that, contrary to representations made in the affidavit, defendant Fratianno was an FBI informant and that he had informed the FBI he was not involved in the Greene murder. Moreover, Carabbia contended the affidavits misrepresented the innocent nature of a telephone conversation with Fratianno and subpoeaned Fratianno to establish this fact (R 309-10, 537-52, 824).

Pretrial disclosure further revealed that, *prior* to Greene's murder, informant-defendant Fratianno received a call from "Pat Foran". Special Agent Patrick J. Foran was the agent in charge of the FBI's organized crime squad in Cleveland and was primarily responsible for the FBI's target investigation of the indicted co-defendants. The name "Foran" also appeared on an envelope seized from Louis Aratari after his arrest. Inside the envelope was the exact location where Aratari was arrested (R 4100-01).

Following these disclosures, a series of motions were made to the trial court, including a motion to reopen the suppression hearings for the purpose of penetrating further the facially defective affidavit (R 672-93, 902-54, 965-93). To this end, defense counsel subpoenaed Ferritto and Fratianno to demonstrate that the affidavit contained ma-

terial misrepresentations of fact necessary to the finding of probable cause (R 672, 713-16, 763-66, 931-32). Special Agent Foran was also subpoenaed (R 558).

Again, the trial court denied these requests *not* because they lacked merit, but rather, on the grounds that the court lacked the jurisdiction over information and witnesses represented to be privileged and under the control of Federal law enforcement agents (R 712-20, 808, 947).

All this demonstrates the affidavit contained false information from an unreliable informer (¶¶20-45) and that information purporting to corroborate the informer was also shown to be untrue (¶¶46-49; App. A158-A162). Under such circumstances, the trial court had a duty to conduct a suppression hearing.

IV. THE ADMISSION OF EVIDENCE DERIVED FROM SEARCHES AND SEIZURES WHICH WERE VIOLATIVE OF FOURTH, FIFTH, AND FOURTEENTH AMENDMENT RIGHTS REQUIRES REVERSAL OF THE DEFENDANTS' CONVICTIONS.

Since the affidavit referred to above provided the sole basis for the December 5, 1977, search of #333 Winchester Hills and was incorporated as a basis for the December 13, 1977, search of 919 Rondel, and because this affidavit was, in large part, based upon the representations of Raymond Ferritto (many of which were ultimately conceded to be outright lies [R 1068]); it is our contention that all evidence seized during these searches should have been suppressed. This thesis is supported by the following arguments:

A. Evidence Was Improperly Seized During a Search of Apartment #333, Winchester Hills Apartments, Willoughby Hills, Ohio, on December 5, 1977, and December 13, 1977.

On December 5th and 13th, 1977, Apartment #333, Winchester Hills was searched pursuant to the issuance of these warrants. This apartment was allegedly used by the defendants and the bomb, according to Ferritto, was assembled there by Cisternino on the morning of the bombing. Included among the items found on December 5th were miscellaneous pieces of a Gold Circle label (Ex. 137E), a rent receipt in the name of Zolton Kalmon (Ex. 137A), two rolls of electrical tape (Ex. 137G), and a Tennelec Memory Scan manual (Ex. 137H) (R 5016-20). Subsequent testimony established the fingerprints of Cisternino, Alfred Calabrese, and one Carmen Marconi were on this manual. During the search of December 13th, a piece of wire insulation was found, a can of deodorized paint thinner (Ex. 100) and some carpet samples (R 4994).

In the affidavit, Ferritto was credited with advising the affiant that he was taken to Apartment 333, Winchester Hills, by Cisternino where he stayed, alone, overnight. He was allegedly met there the next morning by Cisternino who brought with him bomb paraphernalia. At the apartment, Ferritto advised Cisternino assembled the bomb (App. A154-A155). Moreover, as a further illustration of lies by "reliable" Raymond Ferritto, co-defendant Aratari testified as a State's witness during the trial that the bomb car was "already loaded" and in place the night before and was, in fact, the reason it could not be moved out of the lot (R 6312, 6364). (Ferritto, in his affidavit, said Cisternino drove the car to the bombing scene the day of the bombing.) Purged of the erroneous statements, counsel suggests that the affidavits do not provide probable cause to search Apartment 333, Winchester Hills. Counsel con-

tends that more than ample cause existed to believe Ferritto's trustworthiness was suspect from the beginning.

On December 13th, Agent Domin submitted to the United States Magistrate an affidavit in support of another search of #333 Winchester Hills. This search was directed to taking samples of orange and brown shag carpeting and fingerprints on surfaces within the apartment. The affidavit alleged in pertinent part that: 1) in the December 5th search of Apartment 333, the executing officers observed orange and brown shag carpeting, and 2) that the Affiant had learned through his conversations with detective Wegas of the Lyndhurst Police Department, who also participated in the December 5th search of Apartment #333, address *supra,* that fibers observed on the metal bomb box found at the residence of Daniel Greene (the same bomb box which Ferritto advised agent Kahoe that he [Ferritto] and Cisternino placed in front of Greene's residence in September of 1977) appeared to be the same as the carpeting observed in Apartment #333, Winchester Hills in their December 5th search of said apartment (#5, p. 4, of Agent Domin's affidavit). Affiant, in support of his proposed search, incorporated by reference the affidavit submitted by Agent Kahoe in support of the December 5th search of Apartment #333.

B. (1) Evidence Was Improperly Seized During a Search of 919 Rondel, Cleveland, Ohio, of February 6, 1978.

On February 6, 1978, pursuant to an affidavit provided by Agent Kimmel and incorporating the Kahoe affidavit of December 5, 1977, a search was conducted at the home of Donald Ready, allegedly the location where Cisternino had been living off and on as a boarder during the summer and fall of 1977. Included among the items seized at this location were (starting at R 5220), a paper bearing radio

frequencies (Ex. 139A), a list of radio frequencies and license numbers (Ex. 139C), a hearing protector and gun cleaning kit (Ex. 139F), an ammunition belt (Ex. 139H), a room key for the Holiday Inn (Ex. 139I; note that there was evidence that Ferritto stayed there at one time), an alligator clip (Ex. 139J), a throwing knife (Ex. 139K), a cup with ammunition (Ex. 139L), .45 ammunition and holster (Ex. 139R), 9mm ammunition and clip (Ex. 139T), a radio crystal (Ex. 139U) and other items such as holster, ammunition, etc. The affidavit of February 6, 1978, incorporated the Kahoe affidavit of December 5, 1977, and for all the prior asserted reasons dealing with material misrepresentations and again herein incorporated, the items seized pursuant to this search should be suppressed.

(2) The Information Asserted in the Affidavit Was Too Remote in Time to Establish Probable Cause.

In the February 6, 1977, affidavit of Agent Kimmel, he noted that Ferritto told him a radio scanner (which incidentally was never found) was used by Cisternino as a precaution (¶12, p. 5, of affidavit). According to Ferritto, after the bombing of Greene, he (Ferritto) and Cisternino returned to Apartment #333, Winchester Hills. (During his testimony, Ferritto admitted this was a lie.) Since the scanner *supposedly was last seen on October 6, 1977, at Apartment #333,* the question that emerges is where is the probable cause to believe, some four or five months after this observation, the scanner could be found at another location at 919 Rondel, Cleveland, Ohio. This is especially so since Ferritto testified the last time he was on Rondel was during May of 1977—some *nine months* previous to the affidavit (R 3832).

C. Standing Was Improperly Denied.

As to the location at 919 Rondel, it would appear contradictory for the State to argue petitioner Cisternino had no standing to object when the affidavit in support of the search represents that Cisternino lived at this address with a friend and had meetings there with co-defendant Ferritto. This fact was confirmed by one Donald Ready and State's witness Raymond Ferritto during the course of the trial (R 8340). Moreover, some of the seized items were claimed by the State to have belonged to Cisternino and used by him in the Greene matter. As to the location at #333 Winchester, the Kahoe affidavit claims that Cisternino had the apartment key, brought Ferritto to this location and left him overnight. Cisternino allegedly returned to this apartment the next morning with equipment and assembled the bomb. The State's contention of Cisternino's occupancy of this apartment is further enhanced by their claim that the Tennelec Memory Scan manual bearing his prints (Ex. 137H) was used by him in the apartment. Also, according to Ferritto's affidavit, Cisternino was apparently the only person in possession of that apartment.

V. AN ACCUSED IS DENIED A FAIR TRIAL WITH DUE PROCESS OF LAW WHERE THE STATE'S PROSECUTOR WILLFULLY, AND WITH THE EXPRESS APPROVAL OF THE TRIAL JUDGE:

(1) Makes a Highly Emotional Argument, Punctuated by Personal References, Specifically Calculated to Stir Up Racially Prejudicial Attitudes and Otherwise Appeal to Popular Ethnic Stereotypes;

(2) Informs the Jury That He, the State Prosecutor, and All of the Federal and Local Investigators in the Case, Knew As a Fact Those on Trial Were Not Only Guilty of the Specific Charges Being Tried, but Other Serious Charges As Well—Including, but Not Limited to, Murders and the Bribery of Judges and Prosecutors;

(3) Argues That the Various Defense Attorneys Involved in the Case Were Likewise Convinced Their Own Clients Were Guilty;

(4) Commits Numerous Other Acts of Professional Misconduct.

Distilled, and at best, the various segments of the prosecutor's tirade[4] set forth below were flagrant acts of misconduct. *State v. Thayer*, 124 Ohio St. 1 (1931). At worst, they amounted to deliberate attempts to strengthen the State's case against those on trial by impermissible factors and considerations. In our view, the State should not be grateful for such aid. This is especially so if our prosecutors are to be barred from summoning, for the pur-

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4. The entire argument made by the prosecutor appears at App. A102-A127.

pose of achieving a conviction, "that thirteenth juror, prejudice." *United States v. Antonelli Fireworks Co.*, 155 F.2d 631, at 659 (1945). Here we refer to certain remarks that were obviously well-calculated to appeal to prejudice based on national origin and thus, "to sweep jurors beyond a fair and calm consideration of the evidence." In this instance, his argument was an unfortunate appeal to popular ethnic stereotypes ". . . [far] beyond permissible limits." *Commonwealth v. Graziano*, 331 N.E.2d 808 (Mass. 1975).

To be sure, neither the fact that a particular crime was a vile one, nor even the amount, or lack of, evidence against those accused could possibly justify restoring to the type of vituperative arguments indulged in by the prosecutor in this case. The fact that much of the argument was made with the aggressive and persistent approval of the trial court adds a further significant dimension to our complaint.

In our judgment, the level of outrageousness actually achieved by this prosecutor exceeded even that which our Court of Appeals, in *Lonardo v. Ohio*, 34 Ohio Law Rept. 434 (1931), labeled as being "almost unheard of in its latitude of vituperation and bitterness" (*Id.*, at 437). As will be seen, the remarks of this prosecutor, one Carmen Marino, show beyond any possible dispute a virtual litany of prosecutorial anathema that was unavoidably prejudicial to these petitioners. See *ABA's Standards Relating to the Prosecution Function and the Defense Function, Approved Draft (1971)*, ¶¶5.8(c) & (d).

Additionally, the prosecutor impermissibly burdened petitioners' fair trial rights by arguing to the jury that our Government lost, as a consequence of Greene's death, a valued informant in their war on crime. The effect of this statement, which was accentuated throughout his

argument, could only have been to further prejudice the jury against the defense from the standpoint that it tended to *compromise Petitioners' constitutional right of confrontation.* This conduct was exacerbated by the fact that the court had frustrated all efforts by the defense: *first,* to show that Danny Greene was not merely an informant but one of the worst possible sort because he was protected by the FBI in his own criminal activities; and, *second,* to show Danny Greene had been given, by the FBI, an implied license to kill his enemies if they were also enemies of the FBI.

While we are convinced that, regardless of the cogency of any argument made, there was no way our *court* was going to reverse; for us it is clear beyond any doubt that prosecutor Marino's final argument was the most reprehensible, and *unprofessional,* ever given in any American courtroom since the prosecutors in the South were compelled to stop using racial epithets. Thus, for an appeals court to have concluded this prosecutor only deserved to be told they do not "condone" some of his references (App. A99) would be laughable were it not for the seriousness of the case *and* of his conduct.

At the outset, this Court will surely agree there must be a point where any court would be required to reverse a conviction and/or do something other than slap the offending prosecutor on the wrists (as was done here) because of an argument made by him. This being so, as it surely must be, the court's failure to do either here can only be deemed valid if that court's findings as to the relevant facts and application of the law can survive meaningful scrutiny.

First, we address the Court of Appeals' patently erroneous premise that counsel for Cisternino only objected three (3) times and Carabbia's counsel only once, where

the trial records shows at least ten objections. The court then tortured this asserted "fact" into the absolutely incredible conclusion that counsels' failure to object more often was "indicative that they did not think the bulk of the argument improper at the time" (App. A99). Aside from being a *non sequitur,* the court must have been oblivious to the fact that *other counsel repeatedly objected throughout the entire course of the vicious argument,* which objections were entered in response to the overwhelming bulk of its contents. All counsel further moved for a *mistrial* because of the argument made. And, the Opinion ignored the stipulation that *the various objections made by any defense counsel extended to the benefit of all defendants.* (The further fact that the State has yet to make the ridiculous contention that petitioners waived objections to *any* aspect of this unethical argument is more than merely enlightening.)

Second, the Opinion of the Court of Appeals oraculated that the prosecutor's gross remarks were not designed to bolster the credibility of the State's witnesses. If this is so, the unanswered question, if such was not their purpose is: was the court saying they had no purpose and, for that reason, had no effect? Apart from the fact that god-like conclusions really have no place in any lawsuit, the court should have credited the fact that Carmen Marino was not a rookie prosecutor. And, perforce, was aware of their undaunted penchant for excusing abusive tactics of this ilk if otherwise convinced the accused was, after all, guilty. Had this factor been credited, the court then would have been compelled to deal with the irrepressible idea that the prosecutor's resort to the egregious argument made by him was the result of a well-calculated, deliberate gamble that our courts would not dare do more than mildly rebuke him and surely would not break its routine pattern of deeming such arguments, no matter how gross, to be harmless.

Third, the Opinion of the Court of Appeals grossly misapprehended the impact of Marino's arguments. It also failed to assay the trial court's response thereto which was in the presence of the jury. If it were otherwise, there is no way the court could have written that Carmen Marino's abuses were *mere aberrations* (App. A98). And, just as surely, the Opinion would not have exonerated the trial judge by using language that camouflaged his almost total abdication to the prosecutor. Here we refer to the Opinion's inaccurate conclusion that "for the most flagrant remarks the Court gave curative instructions admonishing the jury to disregard the comments" (App. A99).

Now admittedly, which of the countless egregious remarks made by prosecutor Marino were the most unethical and unprofessional is surely debatable. But, included in any contest for that distinction would be the following "aberrations" that *were approved* by the trial court:

(1)

> "The people we are after are the people involved in organized crime. And these men have put a lot on you in the last two days, trying to shed some doubt in a case where there is none.
>
> Now, *we are not walking into an organized crime case with innocent citizens if we are not absolutely sure that these five men are guilty.*" (App. A102.)

* * * * *

(2)

> "Now one of the major points in this case that shows *we knew what these men were doing, we knew that they were planning to kill Danny Greene. They had attempted it before. And they successfully com-*

pleted the murder of Danny Greene and we couldn't stop it." (App. A102-A103.)

* * * * *

(3)

"*What I am telling you is that we knew they were trying to kill Danny Greene and we couldn't stop it.* And if that is an admission of failure, then that is a criticism we have always had with every bombing homicide case in this county." (App. A105.)

* * * * *

(4)

"*. . . [T]here is not one bit of evidence in this case, with the exception that Sinito worked as a bartender, to make these men in any way decent citizens.*" (App. A109.)

* * * * *

(5)

"We dealt with Fratianno, and we squeezed him, too.

Mr. Yelksy: I will object to this your Honor.

The Court: *Overruled.*

Mr. Marino: We sat that man down—and he is an old man too, folks. We sat him down, and the agreement was, because he introduced Ferritto to Delsanter he was a part of the conspiracy, *and we gave him the fine choice of sitting right next to his friend Jack White and going to trial in this case, if he thought he was innocent or there was a reasonable doubt,* or to plead guilty to everything, the very charges we have here, taking his five years from Ohio, and he has to

testify against the organized crime family in Los Angeles." (App. A112.)

* * * * *

(6)

"Remember things like Bonnarigo's photograph in Danny Greene's satchel. And Bonnarigo's, Marconi's and Cisternino's fingerprints on a Cleveland magazine at 919 Rondel.

And since no one had expressed any Opinion as to how that mug shot of Bonnarigo got in Danny Greene's satchel, I will express an opinion. I think the law enforcement community gave it to him. I think they knew he was going to be murdered, or at least an attempt made on his life.

Mr. Willis: Objection.

The Court: *Overruled.*

Mr. Marino: And they gave him as much protection as they could." (App. A115.)

* * * * *

(7)

". . . [O]nly criminals know about organized crime. Only murderers know what goes on in this society.

And when they try to tell you that it is a fictitious organization, folks, *there are certain things that each person knows about his own background.* No matter where you come from, no matter what your ethnic background is, *you know there are certain things peculiar to your background.*

And [as an Italian] I can tell you this, that the organization is not fictitious. They determine what

the membership is, and it is quite obvious. And that is not an ethnic slur.

These people are a monkey on the back of society folks. *These people are murderers."* (App. A116.)

* * * * *

(8)

"And all of a sudden we charge these people with engaging in organized crime, because their gambling is on such a high level that it corrupts society, that *they get to the judges, the prosecutors, yes, and the police.*

Mr. Willis: *Objection, your Honor. There is no evidence on that.*

The Court: *Overruled.*

Mr. Marino: That stinks. And *it is not brought out in the courtroom, because we, the law enforcement community, have been quite inept over the last 90 or 100 years in getting these people to trial."* (App. A117.)

* * * * *

(9)

Mr. Marino: Well, let's look at it from the standpoint of other criminals in this case. Obviously, John Calandra had done much more in this case than anyone else. Why don't they pin it on John Calandra, Licavoli's right hand man? The man who interceded between all the other individuals connected with this case. Why don't they put the rap on him?

Because he's in jail with them, folks. That's why. He is right across the hall here.

Mr. Willis: Objection your honor. *There is no evidence of that.*

The Court: *Overruled.* (App. A118.)

* * * * *

(10)

"But let's face it, folks. Were they put in a dilemma? They claimed they didn't know anything about it. But yet counsel for Mr. Cisternino not only defends his own client, but he defends Jack Licavoli over there. They claim he didn't know the positions of the men in the car. Well, *that's a lie right there.*

Mr. Sperli: *Objection.*

The Court: *Overruled.*

Mr. Marino: Their only problem was, ladies and gentlemen, *those attorneys couldn't tell us that without admitting their clients' complicity.*

Mr. Willis: Objection.

Mr. Sperli: Objection. Absolutely—objection.

The Court: *Overruled.*

Mr. Marino: *So they [the various defense counsel] know that Carabbia was in the back seat. They know Cisternino was at Winchester."* (App. A119.)

* * * * *

(11)

Mr. Marino: *This is no search for the truth. That's the most utterly ridiculous statement I ever heard, whether it came from a prosecutor or a defense attorney.* If this were a search for the truth, ladies and gentlemen it would be an investigation, and every-

one who knows anything about it would cooperate, come forward and make statements. (App. A125.)

* * * * *

(12)

"Then I ask you this. The first person you vote on, you vote on Carabbia. *Because we are 100 per cent sure, from the time we knew he was involved in the—and that was before Mr. Ferritto made his statement,* because we had the toll record of every defendant pulled in this case before Ferritto turned State's evidence.

Mr. Policy: I am going to object to that, because there was no evidence to that effect.

The Court: The jury will rely on its recollection concerning the evidence." (App. A125-A126.) (Emphasis added.)

While the court below adamantly maintained in its Opinion that these unethical remarks made by Mr. Carmen Marino constituted "a rather brief, unfortunate performance during a long closing argument" (App. A98), any analysis of the entirety of this summation shows that neither the abuses delineated nor the argument itself was brief. In fact, the abuses dominated more than two-thirds of his remarks. But, even this is not all. Even more indefensible, because *it is simply wrong,* is the Opinion's arbitrary proclamation that "for the most flagrant remarks, the Court gave cautionary instructions" to the jury (App. A99). This is so because nothing, absolutely nothing, that the trial court told the jury to disregard was (or possibly could be) as *unpardonable* as any one of the segments numbered ¶¶1, 6, 7, 8, 9, 10 and 12 as indicated above. For obviously, none of the remarks the trial court told the jury

to disregard could possibly be as manifestly prejudicial as the above litany of things the trial court affirmatively authorized the prosecutor to tell the jury.

Here, we refer to the fact that the trial judge approved of the prosecutor telling the jury that he and the various enforcement agents involved in this case in investigating and prosecuting the charges "were absolutely sure" Carabbia and Cisternino were guilty (¶1); that they knew *before* Danny Greene was killed that these petitioners were planning to kill Danny Greene and that they had tried to kill him before (*ibid.*); that his "opinion" (that is, Marino's) was that the police "knew . . . [Greene] was going to be murdered, or at least an attempt made on his life" (¶7); that the reason the defendants did not try to pin the crime on Calandra was because he was "in jail with them" (¶9).[5]

Surely, the Court will agree the above analysis thoroughly confutes the appellate court's expressed belief that the trial judge directed the jury to disregard *the most flagrant* of the prosecutor's unethical remarks. For each of those referred to above were far more flagrant violations of the prosecutor's ethical duty than any of the various comments the jury was told by the court to disregard.

But even this is not all—a total decimation and annihilation of the Opinion's point in this regard is furnished by the above segments of the Record. Also, it is our view that Carmen Marino's argument was one of the most flagrantly prejudicial given in recent times in any American courtroom. For nothing could possibly be worse

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5. In addition to the above list, which was not submitted as being complete, the Court of Appeals noted the prosecutor also "intimated Anthony Liberatore [who was then a fugitive] would not live to be tried." (App. A98).

than for a prosecutor (any prosecutor) to argue that the defendant's *own counsel* believes he is guilty (¶10). Simply to say the the unavoidable thrust of that isolatable segment of his argument violated the most essential aspects of a fair trial should have sufficed. However, since it so obviously violated the right of counsel, *Chandler v. State*, 572 P.2d 285 (Okla. 1977), and the right of confrontation, the Opinion's selection of the other aspects of Marino's argument as being more flagrant makes the Opinion's harmless error conclusion all the more defective.

Obviously, the prosecutor's argument in this regard was a willful attack on the specific guarantees of the right to effective representation and confrontation of the witnesses. In addition, the argument artificially created a solid basis for the irrepressible inference that defense counsel not only believed their clients were, in fact, guilty; but, that they were themselves guilty of actually trying to deceive the jury.

The fact that these remarks were certainly not inadvertent, *People v. Weathers*, 62 Ill. 2d 114, 338 N.E. 2d 880 (1975), leads inexorably to the conclusion that they were willful. But, even this is not all. A further aspect of this denigration of counsel is that more than a mere possibility was artificially created for the jurors to infer the prosecutor intended by such remarks to make known some personal knowledge he possessed, gained from confidential sources, that defense counsel were convinced of their clients' guilt. *People v. Tassiello*, 300 N.Y. 425, 91 N.E.2d 872 (1950); *Commonwealth v. Joyner*, 365 A.2d 1233 (Pa. 1976); *People v. Treat*, 43 N.W. 983 (Mich. 1889); *People v. Monroe*, 362 N.E.2d 295 (Ill. 1977). Also, see *Lawn v. United States*, 355 U.S. 339, 359-360, n.15 (1958).

This case then provides the Court with an apt opportunity to reinforce the doctrine proscribing the type of professional misconduct exhibited in the argument made by the prosecutor in this case. Such reinforcement is doubtless needed for, if it were otherwise, the various State courts below surely would have recognized that such arguments as were made here not only violate due process (*Viereck v. United States,* 318 U.S. 236 [1943]; *Berger v. United States,* 295 U.S. 78 [1935]; and *United States v. Love,* 534 F.2d 87 [6th Cir. 1976]) and are unprofessional (*ABA, Standards, Prosecutor's Function,* ¶¶5.8 and 5.9, pp. 40 and 126); they would have also realized such arguments are "incompatible with the proper administration of justice." *United States v. Bugros,* 304 F.2d 177, at 179 (2d Cir. 1952). Also see ABA, *Code of Professional Responsibility,* §DR7-106(c)(4), and its *Canons of Ethics,* No. 22.

Dealing more specifically with the appellate court's Opinion, the bottom line on its approval of the prosecutor's summation seems to be that because the trial judge told the jury on six (6) occasions to disregard certain of the wrongs committed during the prosecutor's almost thirty-seven page tirade, he should be given absolution since these petitioners were, after all, guilty. Further, that despite the fact that more than *FORTY-THREE* (43) objections in all were made by defense counsel during the course of this prosecutor's argument, his specific attack on counsel's integrity and his open assault on petitioners' right to the effective assistance of counsel were mere *aberrations.* The same being true of the prosecutor's direct and specific expressions of opinions on the petitioners' guilt and his blatant excursions outside the Record.

For our part, even the few arguments which were subject to the given cautionary instructions were so egre-

gious as to be incurable by the corrective instructions that were given in those isolated instances. This is especially so once the prosecutor made his direct appeal to ethnic prejudices. *McFarland v. Smith,* 611 F.2d 414 (2d Cir. 1979); see also, *Commonwealth v. Graziano,* 331 N.E.2d 808 (1975).

Hopefully, this Court will be persuaded by *People v. Weathers,* 62 Ill. 2d 114 (1975), where the prosecutor charged defense counsel with lying, as did Carmen Marino in his summation in this case. See also *People v. Kane,* 393 N.Y.S.2d 439 (1977) (prosecutor stated legal aid attorney did not believe his client innocent); *Russell v. State,* 532 S.W.2d 268 (Tenn. 1976) (error to attribute to counsel fabrication of insanity defense).

It is also our view that it is not without significance that the Opinion below contains no reference whatsoever to the personal attacks made on counsel during the course of the prosecutor's peroration. Surely, the fact that these vitriolic attacks, as the Record set forth above clearly shows, were made with the affirmatively *expressed approval of the trial court, who repeatedly rejected defense objections,* merited for them individualized consideration. This is especially so since it cannot be denied a prosecutor's summation can produce errors of constitutional proportions. *Donnelly v. DeChristoforo,* 416 U.S. 637 (1974).

Finally, as to the efficacy of the curative instructions given by the trial court to correct several of the *other* prejudicial excesses in the prosecutor's argument, the statement made in *United States v. Rudolph,* 403 F.2d 805 (6th Cir. 1968), another case tried in Cleveland, seems especially appropriate. Here it was stated (in a situation where, unlike the present case, the jury was specifically instructed as to all wrongs involved) that it must be re-

membered that "after the saber thrust, the withdrawal still leaves the wound" (*id.*, at 807).

To be sure, for our part "if you throw a skunk into the jury box" as was done by Carmen Marino, "it makes no sense to instruct the jury not to smell it or to say they did not smell it." *Dunn v. United States*, 307 F.2d 883, at 886 (5th Cir. 1962). It makes even less sense to tell a jury it is alright to smell the skunk and then conclude its smell nonetheless had no effect on their ability to detect and correctly identify the fragrances of the other odors present.

CONCLUSION

Based on the opinions below where, as here, a witness looking at a photographic array that was grossly *slanted* against a particular individual could only say such person came closest to resembling the suspect; it is nonetheless perfectly all right for the prosecutor to tell the witness she picked the right person. In addition, according to these same courts, it is simply not prejudicial for the prosecutor to argue to the jury that not only were all of the law enforcement people involved in the investigation fully convinced these petitioners were guilty, but so were the various defense counsel.

If nothing else, these arguments in particular clearly show the relative ease with which the rules of fair play can be flaunted by zealous prosecutors. And, it shows a penchant by Ohio's reviewing courts to simply ignore even grievous flaws if they are convinced the verdict was correct.

Hopefully, this Court will be persuaded that a new trial is required to avoid the reproach that justice may have miscarried here solely because the trial prosecutor

was allowed to operate in open defiance of ethical and due process restrictions on his conduct.

Respectfully submitted,

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